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89-966

Supreme Court, U.S.
FILED
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CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILLIAM M. BIERMANN, PETITIONER,

V.

SYLVIA WREN, DIRECTOR,
INTERNAL REVENUE SERVICE CENTER,
ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the Internal Revenue Service follow proper procedures in assessing petitioner for payment of the taxes as required by statutory law and regulations?

(2) Does the document titled "Statement of Tax Due on Federal Tax Return", Form 3552 (Rev.8-85), furnished petitioner by the Internal Revenue Service for the years 1980, 1981 and 1982 meet the requirements of an assessment document as provided by statutory law and regulations?

(3) Did the Eleventh Circuit of the United States Court of Appeals render a decision in conflict with decisions of the Third and Fifth Circuits of the United States Court of Appeals?; keeping in mind that the decision in the Fifth Circuit (Brafman v. United States) is a decision the Eleventh Circuit is bound to follow.

(4) Was petitioner denied discovery rights by the Atlanta Division of the United States District Court for the Northern Dist. of Ga?

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Petitioner prays that a writ of certiorari issue to review OPINION of the United States Court of Appeals for the Eleventh Circuit entered the 26th of May 1989.

OPINIONS BELOW

The following reports are referenced by the Courts in the opinions below:

Biermann v. Commissioner of Internal Revenue, No. 86-5033 (11th Cir.Aug.27,1986);

Biermann v. Commissioner, 2477-84 (Tax Court Sept. 24th, 1985);

Harlow v. Fitzgerald, 457 U.S. 800;

United States v. Miller, 318 F.2d 637 (7th Cir. 1963);

United States v. Powell, 494 F.Supp. 260 (S.D. Ga. 1980).

The ORDER of the Atlanta Division of the United States District Court for the Northern District of Georgia, granting defendants' motion to dismiss and imposition of sanctions and denying plaintiff's motion to compel and for sanctions, was filed the 12th of April 1988 and entered the 14th of

April 1988, is set forth in pgs 6A-12A Apndx. The OPINION of the Eleventh Circuit Court of Appeals, affirming the judgment of the District Court, entered the 26th of May 1989 and marked **DO NOT PUBLISH**, is set forth in pgs 2A-5A Apndx.

JURISDICTION

The date of JUDGMENT sought to be reviewed by this Court is the 26th of May 1989 entered by the United States Court of Appeals for the Eleventh Circuit on the 26th of May 1989 and ISSUED AS MANDATE the 23rd of August 1989, is set forth in pgs 13A-14A Apndx.

A REHEARING on the above JUDGMENT was DENIED on the 9th of August 1989 and is set forth in pg 15A Apndx.

The JUDGMENT of the Atlanta Division of the United States District Court for the Northern District of Georgia, in support of their ORDER entered the 14th of April 1988, was entered the 15th of April 1988, and is set forth in pgs 16A-17A Apndx.

The date of the ORDER of this court, No. A-286,

is the 23rd day of October 1989, in which is ORDERED that the time for filing a petition for a writ of certiorari is extended to and including the 17th of December 1989.(Sunday) The statutory provision believed to confer on this Court jurisdiction to review the judgment by writ of certiorari is Section 1254(1) of Title 28, United States Code.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved in this action:

Internal Revenue Code: Sections 6203, 6215(a), 6303(a), and 7426(a).

Federal Income Tax Regulations: Sections 301.6203-1, 301.6215-1 and 301.6303-1.

Internal Revenue Code

Section 6203, cited in Brafman v. United States, 384 F.2d 863 (1967) at 865 and 866:

> "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment."

Section 6215(a):

> "General Rule.--If the taxpayer files a

petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary."

Section 6303(a), cited in United States v. Jersey Shore State Bank, 781 F.2d 974 (3rd Cir.1986) at 978:

"General Rule.--Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person or shall be sent by mail to such person's last know address."

On writ of certiorari, the Supreme Court in Jersey Shore State Bank v. United States, 107 S.Ct. 782 (1987) affirmed the decision of the 3rd Cir. in United States v. Jersey Shore State Bank, supra, relating to Section 6303(a) of the Internal Revenue Code.

Section 7426(a) Actions Permitted.--

"(1) Wrongful levy.--If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien

on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary." (underline added).

Federal Income Tax Regulations

Section 301.6203-1, cited in Brafman v. United States, supra, at 865 and 866:

"The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed."

Section 301.6215-1:

"Where a petition has been filed with the Tax Court, the entire amount redetermined as the deficiency by decision of the Tax Court which has become final shall be assessed by the district director or the director of the regional service center and the unpaid portion of the amount so assessed shall be paid by the taxpayer upon notice and demand therefor."

Section 301.6303-1:

"(a) General rule.--Where it is not otherwise provided by the Code, the district director or the director of the regional service center shall, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be given as soon as possible and within 60 days. However, the failure to give notice within 60 days does not invalidate the notice. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last know address."

NOTICE TO THE COURT: That part of this petition titled **STATUTES AND REGULATIONS INVOLVED** was inadvertently left out during initial preparation. Consequently, it became necessary to incorporate that section under

pages numbered 3a-3d of this petition. Therefore, wherever a reference to page 3 appears in this petition, it will be considered to be such as so referenced, even though the reference may actually appear on a page followed by the letter a, b, c, or d.

FACTUAL STATEMENT OF THE CASE

This action began as a Complaint with the Atlanta Division of the United States District Court for the Northern District of Georgia Oct. 20, 1987. The basis for filing the Complaint was that the Internal Revenue Service, through respondent SYLVIA WREN, had not made a valid assessment of the taxes against petitioner on which the collections procedure could be based. Therefore, petitioner, on Oct. 21, 1987, served Ass't U.S. Attorney Curtis Anderson with a Notice to Produce various documents necessary to establishing the assessment procedure for

production on Oct. 23,1987 in a hearing for a temporary restraining order before the Honorable Charles A. Moye, Jr. Respondents, did not produce at the hearing any of the documents set out in the Notice to Produce. Petitioner also filed an affidavit at that hearing in support of his Motion for Temporary Restraining Order from levying on his property, which was DENIED by the Court on the 23rd of Oct. 1987.

On Oct. 27, 1987, petitioner served his Plaintiff's Request for Production of Documents establishing the assessments in question. The respondents did, on or about December 21, 1987, respond, but failed to produce the documents requested, and as a result of that response and the failure to further respond, petitioner, on Jan. 20, 1988, filed a Motion to Compel and for Sanctions. On Dec. 24, 1987, the respondents filed a Motion to Dismiss and for Sanctions. In response, petitioner on his motion requested an oral hearing/to compel and for

sanctions. However, the Court, on the 12th of April 1988, without a hearing, issued an order denying the motion to compel and granted respondents' motion to dismiss and for sanctions. The JUDGMENT of the Court was rendered on April 15, 1988, and a Notice of Appeal was filed on May 13, 1988.

Prior to filing the Complaint with the Federal District Court, petitioner had petitioned the United States Tax Court for a determination of his liabilities for the years 1980, 1981 and 1982. The Tax Court determined the liability for those years, which determination became final on August 27, 1986. Petitioner then attempted to obtain through the Internal Revenue Service those documents which identified him as the taxpayer, specifying the character of the liability, the date of the assessment, the tax period, and the amount of the assessment. The only document disclosed was a "Summary Record of Assessment, RACS Report -006". As a result of the inability to

obtain the assessment documents specified in Section 6203 of the Internal Revenue Code of 1954, as amended, the Regulation Section 301.6203-1 and the Internal Revenue Manual, Volume 11, Part 5, Section 5312(1) at page 6531, the petitioner sought the services of an attorney to enforce his rights as a person against whom an assessment had not been made.

On the 18th of July 1986, the Internal Revenue Service filed a "Notice of Federal Tax Lien Under Internal Revenue Laws", Form 668(Y), for the 1980-1982 income tax liability, and on September 1, 1987, they levied on the petitioner's residential real property. Notice of Seizure, Form 2433, was served on the petitioner on the 11th of September 1987. In view of the fact that the Internal Revenue Service would not stay its collection procedure pending verification of the supporting documents, as required by the Code, Regulations and Manual, the petitioner had no choice but to

file the Complaint and seek a temporary restraining order.

The petitioner, in his attempt to verify the existence of the Assessment Certificate, Form 23C, and the supporting data specifying his identity, the character of the liability,the date of the assessment, the tax period, and the amount of the assessment, was thwarted at every stage, namely, by the Internal Revenue Service disclosure office, by the Collection Division of the Internal Revenue Service in Sarasota, Florida and by trial attorneys. The only document obtained ("Summary Record of Assessment, RACS Report-006") only contained totals by tax category, but did not identify petitioner as the taxpayer, nor specify the character and the amount of the tax assessed against the petitioner, or the tax period involved in the assessment against him. In response to the "Notice to Produce", and the "Request for Production of Documents", the UNITED STATES did not

produce a single document requested.

The Court of first instance in this action is the Atlanta Division of the United States District Court for the Northern District of Georgia, and the Federal Jurisdiction for them to proceed is 26 U.S.C., Section 7426(a).

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The argument in this action centers around three issues. They are:

(1) Petitioner has not been properly procedurally assessed for payment of the taxes;

(2) Petitioner has not been given a proper procedural "Notice and Demand" for payment of the taxes;

(3) Petitioner has been denied discovery rights by the Federal District Court.

It appears that the Eleventh Circuit Court of Appeals has rendered a decision in conflict with a decision of the Third Circuit of the United States Court of

Appeals, (upheld by this Court), and which also conflicts with a decision handed down by the Fifth Circuit of the United States Court of Appeals. Both of these decisions will be brought forward further along in this argument.

ASSESSMENT

Petitioner has not been properly procedurally assessed for payment of the taxes as so brought forward in the **FACTUAL STATEMENT OF THE CASE** (pgs 3-8 of this petition). Section 6215(a) of the Internal Revenue Code (26 USC) clearly states the following:

> "**General Rule.**--If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary."

The method of assessment is established by Section 6203 of the Code, which also clearly states the following:

> "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in

> accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment."

Regulations describing how the assessment is to be carried out can be found in Section 301.6203-1, Income Tax Regulations (26 CFR), which provides that the assessment shall be signed by an appointed assessment officer, and that if the taxpayer requests a copy of the record of assessment, he shall be furnished that document setting forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period and the amounts assessed.

Section 301.6215-1, Income Tax Regulations (26 CFR), simply repeats what is stated in Section 6215(a) of the Code, but substitutes "district director or director of the regional service center" in place of the "Secretary".

None of the documents furnished by the Internal Revenue Service before or during

trial, as so brought forward on pages 3-8 of the **FACTUAL STATEMENT OF THE CASE**, meets the assessment requirements established by Section 6215(a) and 6203 of the Code or Sections 301.6215-1 and 301.6203-1 of Income Tax Regulations (26 CFR). The Eleventh Circuit in their OPINION (pg 4A Apndx) attempts to substitute a computer print-out document titled "Certificate of Assessments and Payments", marked as Exhibit "A", as a document meeting the requirements of Section 301.6203-1 , in which is provided that the assessment document shall be signed by an appointed assessment officer. The signature on the document referred to in the Court's OPINION is not that of an appointed assessment officer, so therefore conflicts with the decision of the Fifth Circuit of the United States Court of Appeals in Brafman v. United States, 384 F.2d 863(1967) requiring that the assessment certificate must be signed by the proper official prescribed by the applicable Treasury

Regulation, which is binding on the government as well as on the taxpayer, as is so stated in the decision.

NOTICE AND DEMAND

Petitioner has not been given a proper procedural "Notice and Demand" for payment of the taxes. Section 6303(a) of the Internal Revenue Code (26 USC) clearly states the following:

> "**General Rule.**--Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person or shall be sent by mail to such person's last know address." (emphasis added).

Section 301.6303-1, Income Tax Regulations (26 CFR) also simply repeats what is stated in Section 6303(a) of the Code, but substitutes "district director or the director of the regional service center" in place of the "Secretary".

The documents, "Statement of Tax Due on

Federal Tax Return" furnished petitioner by the Internal Revenue Service, and referenced in the OPINION of the Eleventh Circuit as Exhibit "D" (pg 4A Apndx), are not signed and do not meet the requirements of 6303(a) of the Code or 301.6303-1 of 26 CFR,wherein is necessitated the "giving of notice and demanding of payment thereof", and clearly conflicts with United States v. Jersey Shore State Bank, 781 F.2d 974 (3rd Cir.1986). That the form, "Statement of Tax Due on Federal Tax Return" referenced in the Court's OPINION, does not meet the requirements of the Code and Regulations is easily discernible by this Court by referring to page 18A of the Appendix wherein a copy of that form for the "Tax Period Ended: 12-31-82" relating to the petitioner can be found. The Court will please take note that nowhere on that form is there any demand for payment of taxes. To the contrary, it merely ask for payment, and by no stretch of the imagination demands

payment. However, in United States v. Jersey Shore State Bank, supra; affirmed by this Court in Jersey Shore State Bank v. United States, 107 S.Ct.782 (1987); it states the following at page 978:

> "Section 6303(a) not only requires the government to "give notice to each person liable for the amount of the tax", it also requires notice of a particular kind: i.e., one "stating the amount and demanding payment thereof." In other words, a section 6303(a) notice consist of two discrete elements: (i) notice of the amount that has been assessed and(ii) a demand that the individual receiving the notice presently satisfy that assessment. Thus, the plain language of the statute envisions a notice not unlike a typical creditor's dunning letter, providing the individual receiving it with one last opportunity to pay the taxes before the government invokes the full panoply of its administrative collection powers."

Not only does the District Court's OPINION conflict with that of United States v. Jersey Shore State Bank, supra, but the three (3) documents furnished petitioner by the Internal Revenue Service for the tax years in question (1980-1982) titled "Statement of Tax Due on Federal Tax Return", were mailed to him by the Internal Revenue

Service and not left at his residence as so required by Section 6303(a) of the Code and 301.6303-1 (26 CFR), (upheld in United States v. Jersey Shore State Bank), thereby creating another violation of statutory law.

DISCOVERY RIGHTS

Inasmuch as the District Court Judge, in response to petitioner's oral request for a hearing on his motion to compel and for sanctions, without a hearing, issued an order denying his motion, and granted defendants' motion to dismiss and for sanctions, petitioner's right to receive the documents as provided by Rule 34 of Federal Rules of Civil Procedure, were violated, thereby denying him "due process of law".

RULE 17 CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

Inasmuch as this petition satisfies the special and important reasons for granting a petition for writ of certiorari brought forward under Rule 17 of RULES of the Supreme Court of the United States, petitioner further prays this Court issue a

writ of certiorari to review OPINION of the Eleventh Circuit entered the 26th of May 1989.

In closing, I respectfully bring to this Court's attention that, in Biermann v. Commissioner of Internal Revenue, No.86-5033 (11th Cir.Aug.27,1986), the Court's decision was based on the issue of liability. However, in this action, the issue relates to the missing assessment of taxes by the IRS after the decision of the Tax Court,as so required by statutory law. Also, my so called admission in my motion to the Eleventh Circuit (pg 11A Apndx) that I had been assessed by the IRS, is in reference to the entry on the form represented in page 18A, wherein is stated the Assessment Date is 02-20-86. In my motion to the Court I was only stating what appears on that form attached thereto and is not an admission of assessment.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS Page

OPINION, Eleventh Circuit Court of Appeals, Biermann v. Wren, Director, Internal Revenue Service Center, et al, No. 88-8342, entered May 26, 1989 marked **DO NOT PUBLISH** ---------- 2A-5A

ORDER, District Court for the Northern District of Georgia, Biermann v. Wren, et al, No. 1:87-cv-2300-CAM, entered April 14, 1988 ---------- 6A-12A

JUDGMENT, Eleventh Circuit Court of Appeals, Biermann v. Wren, Director, Internal Revenue Service Center, et al, No. 88-8342, (D.C. Docket No. 1:87-2300), entered May 26, 1989 ---------- 13A-14A

REHEARING, Eleventh Circuit Court of Appeals, Biermann v. Wren, Director, Internal Revenue Service Center, et al., No. 88-8342, entered August 9, 1989 - 15A

JUDGMENT, District Court for the Northen District of Georgia, Biermann v. Wren, et al, No. 1:87-cv-2300:CAM, entered April 15, 1988 ---------- 16A-17A

Statement of Tax Due on Federal Tax Return, Treasury Form 3552 (Part 3) (Rev.8-85) ---------- 18A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-8342
Non-Argument Calendar

D. C. Docket No. 1:87-2300

WILLIAM M. BIERMANN,
Plaintiff-Appellant,

versus

SYLVIA WREN, Director, Internal Revenue Service Center, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

(May 26, 1989)

Before HATCHETT, ANDERSON, and CLARK, Circuit Judges.

PER CURIAM:

William M. Biermann appeals from the district court's dismissal of his suit for wrongful levy and award of Rule 11 sanctions against him and his attorney. Because Biermann's appeal is frivolous, we affirm the judgment of the district court and, pursuant to Fed.R.App.P. 38, remand to the district court for a determination of a reasonable attorney's fee for the government's prosecution of this appeal.

Biermann brought this action pursuant to Section 7426(a)(1) of the Internal Revenue Code of 1954, 26 U.S.C. §7426(a)(1) (West Supp. 1989), which provides:

> "(a) Actions permitted.-
>
> (1) Wrongful levy.- If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States." (emphasis added).

Biermann contends that the district court erred in dismissing his appeal for lack of jurisdiction, because the government has presented

no proof that he is in fact the person against whom has been assessed the tax out of which the levy he contests arose. This contention is without merit. A review of the record reveals that this court has previously affirmed the tax court's adjudication of Biermann's tax liability at issue here. Biermann v. Commissioner of Internal Revenue, No.86-5033 (11th Cir. August 27, 1986). Moreover, we need not address the legal status of the Certificate of Assessments and Payments, R1: Tab 5 (Exhibit "A"), to note that Biermann's taxpayer identification number on that Certificate is the same as that which appears on the Levy, Form 668-B, which Biermann contests in this case. R1: Tab 2 (Exhibit "A"). We note further that the name, address and taxpayer identification number printed on the levy which Biermann disputes are identical to those which appear on the Statement of Tax Due on Federal Tax Return, dated February 20, 1986. R1: Tab 5 (Exhibit "D"). This cumulative evidence conclusively establishes that Biermann

is the person against whom has been assessed the tax out of which the levy he challenges arose. Accordingly, he is barred from bringing this action, and the district court was correct in dismissing it for lack of jurisdiction.

Because the frivolous nature of this suit should have been clear to Biermann and his counsel, the district court did not err in assessing Rule 11 sanctions in the amount of $5,000.

Furthermore, because we conclude pursuant (SIC) to Fed. R. Civ./P. 38 that this appeal is frivolous, we remand to the district court for a determination of an appropriate attorney's fee for the government in its prosecution of this appeal. We direct the clerk of this court to assess double costs against appellant.

AFFIRMED AND REMANDED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

APR 12, 1988

LUTHER D. THOMAS, Clerk
By: /s/ F. Newsom, Deputy Clerk

WILLIAM M. BIERMANN, :

Plaintiff, :

vs. : 1:87-cv-2300-CAM

SYLVIA WREN, et al., :

Defendants.:

ORDER OF COURT

The above-styled case is before this court on Plaintiff William M. Biermann's motions to compel and for sanctions and on the defendants' motions to dismiss and for imposition of sanctions. For the reasons set forth below, the court DENIES the plaintiff's motion to compel and GRANTS the defendants' motions to dismiss and for imposition of sanctions.

The plaintiff, William M. Biermann, has been assessed with federal income tax liabilities for the years 1980, 1981, 1982 and a penalty for filing false withholding information in 1986. The defendants have attached as an exhibit to Defendants' Statement of

Material Facts certified copies of Certificates of Assessments and Payments issued with respect to Mr. Biermann's federal tax liability. The assessments for the years 1980, 1981 and 1982 are a result of a decision of the United States Tax Court in Biermann v. Commissioner, 21777-84 (Tax Ct. Sept. 24, 1985). Mr. Biermann appealed the Tax Court decision to the Court of Appeals for the Eleventh Circuit which affirmed the Tax Court's decision and awarded the United States $1500 in damages for having to defend against a frivolous appeal. Biermann v. Commissioner, No.86-5033, (11th Cir., Aug. 27, 1986). Mr. Biermann now brings suit under 26 U.S.C. § 7426 to enjoin an allegedly wrongful levy by the Internal Revenue Service. The plaintiff's motion for a temporary restraining order was denied by this court on October 23, 1987.

As an initial matter, the court notes that it agrees with the defendants that it lacks jurisdiction with respect to two of the the named defendants -- Sylvia Wren and the

Department of the Navy. It is well settled that government officials engaged in carrying out their appointed duties are immune from suit. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). Nothing in the plaintiff's complaint alleges that Ms. Wren has acted beyond the scope of her duties or committed any sort of constitutional tort. Thus, plaintiff has not stated any basis for this court to exercise jurisdiction over Ms. Wren, and the suit is dismissed as to her.

In addition, the Department of the Navy is immune from the suit. It is well settled that absent specific statutory waiver a suit may not be brought against an agency of the United States but must be brought against the United States itself. It appears that the plaintiff has named the Department of the Navy as a defendant in order to have the Navy directed to disregard any Internal Revenue Service levies on the plaintiff's Naval pension. However, 26 U.S.C. § 6332(a) provides that any person in possession of property u-

pon which levy has been made shall surrender the property to the Secretary of the Treasury. The plaintiff has stated no claim against the Navy upon which relief can be granted, and the suit is therefore dismissed as against the Department of the Navy.

The plaintiff has brought suit pursuant to 26 U.S.C. § 7426(a)(1) which provides in relevant part:

> If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in lien on such property. . . may bring a civil action against the United States . . .

(emphasis added). Mr. Biermann alleges that the Internal Revenue Service has wrongfully levied upon his property. As the Certificate of Assessments and Payments attached to the defendants' Statement of Material Facts makes perfectly clear, Mr. Biermann is the person against whom the taxes were assessed. The United States Tax Court has determined that Mr. Biermann is an individual who owes taxes

for the years 1980, 1981 and 1982, and the United States Court of Appeals for the Eleventh Circuit has concurred that Mr. Biermann owes the income taxes. While it is true that the false withholding information penalty was not litigated before the Tax Court or the Eleventh Circuit, the Certificate of Assessments and Payments creates a presumption that the assessment was made in accordance with the statute and regulations. See United States v. Miller, 318 F.2d 637 (7th Cir.1963); United States v. Powell, 494 F. Supp. 260 (S. D. Ga. 1980).

The plaintiff's argument, absurd as it may seem, appears to be that he is not the person against who the taxes are assessed because he never received notice of the assessments. First, it is not necessary that a taxpayer receive notice and demand in order for there to be a valid assessment against him. Notice and demand is relevant for collection purposes; that is, in order for the general federal tax lien to arise, notice and demand

must be made. See 26 U.S.C. § 6321; Treas.Reg. § 301.6303-1 (late notice and demand does not invalidate assessment). Thus, even if Mr. Biermann had not received notice and demand of the assessments, he would still be the person against whom the taxes were assessed. But more importantly in this case, Mr. Biermann acknowledged receiving notice and demand when he attached copies of the IRS notices to his Motion to Delay Commencement of his appeal to the Eleventh Circuit. Mr. Biermann's affidavits submitted in this case stating that he has not received a notice and demand is in direct contradiction to his prior statements and representations to the Eleventh Circuit and raises a serious question concerning his veracity under oath.

As outlined above, it is evident that this plaintiff is the person against whom the taxes were assessed and that there is no jurisdiction under 26 U.S.C. § 7426 with respect to this lawsuit. Accordingly, the suit is dismissed.

The court finds that this lawsuit, based on the theory that the plaintiff is not the person against whom the taxes were assessed, is a patently frivolous lawsuit filed in violation of Fed.R.Civ.P. 11. Accordingly, the court imposes sanctions against the plaintiff and his attorney jointly in the amount of $5,000.00, to be paid into the court, for wasting the time and resources of the Department of Justice and this court.

IT IS SO ORDERED, this 12 day of April, 1987.

/s/ Charles A. Moye, Jr.
United States District Judge

ENTERED ON DOCKET
APR 14, 1988
BY L.D.T.,CLERK
DEPUTY CLERK

William M. Biermann,
Petitioner pro se
312 N.E. Lakeview
Drive, Apt 2
Sebring, Florida 33870
Tel:(813) 382-7547

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-8342
Non-Argument Calendar

D.C. Docket No. 1:87-2300

WILLIAM M. BIERMANN,
Plaintiff-Appellant,

versus

SYLVIA WREN, Director, Internal Revenue Service Center, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before HATCHETT, ANDERSON and COX, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED; and that this cause be and the same is hereby REMANDED to said District Court for a determination of attorney's fees in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiff-

appellant pay to defendants-appellees, double costs on appeal to be taxed by the Clerk of this Court.

Entered: May 26, 1989
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: AUG 23, 1989

William M. Biermann, Petitioner pro
312 N.E. Lakeview Drive, Apt 2
Sebring, Florida 33870

Telephone: (813) 382-7547

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S.COURT OF APPEALS
ELEVENTH CIRCUIT
F I L E D
AUG 9, 1989
MIGUEL J. CORTEZ
CLERK

NO. 88-8342

WILLIAM M. BIERMANN,
Plaintiff-Appellant

versus

SYLVIA WREN, Director, Internal Revenue Service Center, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion May 26, 11 Circ., 1989, ____F.2d_____).

Before HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing in Banc are DENIED.

ENTERED FOR THE COURT: (Aug 9, 1989)

/s/ R. Hatchett
United States Circuit Judge

ORD-42

William M. Biermann, Petitioner pro se
312 N.E. Lakeview Drive, Apt 2
Sebring, Florida 33870
Telephone: (813) 382-7547

AO 450(Rev.5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

WILLIAM M. BIERMANN

JUDGMENT IN A CIVIL CASE

V.

Case Number:1:87-cv-2300:CAM

SYLVIA WREN, et al

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered, defendants' motions to dismiss and for imposition of sanctions.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed and that the defendants, United States of America, Department of Navy, and Sylvia Wren, recover from the plaintiff, William Biermann, their cost of action.

FURTHER ORDERED that court imposes sanctions against the plaintiff, William Biermann, and his attorney, Arthur P. Tranakos, jointly in the amount of Five Thousand ($5,000.00) dollars, to be paid into the court.

*

*

FILED IN THE CLERK'S OFFICE
April 12, 1988
ENTERED ON DOCKET
April 15, 1988
LUTHER D. THOMAS, Clerk

By: /s/ Brinkly B. Flaniga
Deputy Clerk

4/15/88
Date

LUTHER D. THOMAS
Clerk

/s/ Brinkly B. Flaniga
(By) Deputy Clerk

William M. Biermann, Petitioner pro se
312 N.E. Lakeview Drive, Apt 2
Sebring, Florida 33870

Telephone: (813) 382-7547

Department of the Treasury
Internal Revenue Service

Director 4800 BUFORD HIGHWAY
CHAMBLEE, GA 30341
Date Of This Notice: 23C 02-20-86

DLN - For IRS Use Only				670
59251-051-12002	30	82	12	570

If you find it necessary to inquire about your account, please refer to this number 272-12-1562

Form Number: 1040 Tax Period Ended: 12-31-82
Assessment Date: 02-20-86 09-24-85 02-20-86

WILLIAM M. BIERMANN
192 PARKLAND DR
LAKE PLACID FL 33852

Statement of Tax Due on Federal Tax Return

This is a notice of tax due on your return identified above. The amount shown as Balance Due should be paid within 10 days from the date of this notice. Please make your check or money order payable to the Internal Revenue Service and send it with this notice to the address shown above.

If the total amount due as shown below is incorrect because of a recent payment, please send any balance due and attach an explanation of the difference.

Reference	Assessment	Adjustment or Credit	Balance Due
02-20-86 TAX	4,705.00		
02-20-86 INT	1,887.14		
02-20-86NEG PEN	1,052.40		
02-20-86DEL PEN	1,173.37		
02-20-86EST PEN	457.06		
Penalty-Failure to Pay	.00		
Other Penalty	.00		$9,274.97

William M. Biermann,
Petitioner pro se
312 N.E.Lakeview Apt2
Sebring, Florida 33870
Tel: (813) 382-7547

Form 3552
~~(Part 3)(Rev.8-85)~~

Please return this copy with your payment to the address shown above.

AFFIDAVIT OF SERVICE OF THIS PETITION FOR WRIT OF CERTIORARI

As required by Rule 28.5. and 28.5.(c) of RULES of the Supreme Court of the United States, this is to certify that in addition to the forty (40) copies served on the Clerk of the United States Supreme Court, that copies as so indicated below of the foregoing PETITION FOR WRIT OF CERTIORARI, have also been served on the following parties, in the the United States Mail, in a postage paid first-class wrapper to the addresses shown on the following date; and that this constitutes service on all parties so required to be served: DEC 12 1989.
(Date Served)

Solicitor General (3 copies)
Department of Justice
Washington, D.C. 20530

Assit Attorney General (1 copy)
Tax Division
Department of Justice
Washington, D.C. 20530

William M. Biermann

William M. Biermann, Petitioner pro se
312 N.E. Lakeview Drive, Apt 2
Sebring, Florida 33870

Telephone: (813) 382-7547

STATE OF FLORIDA
COUNTY OF HIGHLANDS

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State aforesaid and in the County aforesaid to take acknowledgments, personally appeared WILLIAM M. BIERMANN, to me known to be the person described in and who executed the foregoing PETITION FOR WRIT OF CERTIORARI, and who acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 7th day of December 1989.

MY COMMISSION EXPIRES:
Notary Public, State Of Florida At Large
My Commission Expires May 01 1990
Bonded By Lawyers Surety Co.

(SEAL)